Supreme Court, U.S.
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87-161

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

JOHNNY COPELAND,

Petitioner

- v. -

RICHARD L. DUGGER,
Secretary, Department of Corrections
and
STATE OF FLORIDA,

Respondents.

BRIEF OF RESPONDENTS

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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO ADDRESS THE APPLICABILITY OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) AND ENGLE V. ISAAC, 456 U.S. 107 (1982) TO CLAIMS OF SENTENCING ERROR FOUNDED UPON THIS COURT'S DECISION IN HITCHCOCK V. DUGGER, _____ U.S. _____, 107 S.Ct. 1826 (1987)

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BRIEF OF RESPONDENTS

The Respondents submit that the petition for writ of certiorari should be granted as argued herein.

OPINIONS BELOW

The Petitioner's statement is accepted.

JURISDICTION

The Petitioner's statement is accepted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted. The State of Florida would additionally note:

Amendment V of the Constitution of the United States:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor

shall private property be taken for public use without just compensation.

Amendment X states:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people."

Amendment XIV provides, inter alia:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Johnny Copeland, with two accomplices (Smith and Hall) abducted, raped and murdered nineteen year old Sheila Porter, two weeks before Christmas.

Copeland was not the poor, almost retarded black victim of racist prosecution represented in his petition. His low I.Q. score was attributed to his deliberate faking of his tests by two examining psychiatrists (Dr. Senior and Dr. Cook). A third expert, Dr. Wray, found Copeland to have been sane and competent during his crimes. Further belying Copeland's claim of low intelligence was his successful employment as a skilled brickmason, earning a substantial salary and living (including paying his bills, etc.) quite normally. Copeland even filed some sworn (verified) and pro se pleadings.

Copeland was tried in his home county of Wakulla, Florida. At a special hearing

on venue (due to publicity) the media representatives testified to reporting known facts about the case while avoiding editorials or judgmental pieces. Potential jurors were screened to remove any who would be affected by racial factors. There is no question that Copeland received a fair trial.

Prior to trial, and belying the claim that "Hitchcock" claims could not have been raised in 1979, defense counsel moved the court to declare the death penalty unconstitutional if nonstatutory mitigating factors could not be argued to the sentencer. (R 166) In doing so, defense counsel argued that decisions in "Lockett", "Cooper" and "Songer" had already established Copeland's right to argue these factors to the jury. (R 166-167) The State did not challenge Copeland's right to argue this evidence and, at the sentencing phase, all desired nonstatutory mitigating

evidence was presented and argued to the jury.

The issue of "jury instructions" was not preserved by objection or raised on appeal, obviously because any "error" was harmless, if even extant.

Copeland has chosen to withhold these facts from this Honorable Court in favor of racial hyperbole.

Copeland raised the claim regarding the jury instruction in a motion for post conviction relief filed just prior to his scheduled execution. The issue was rejected by the Circuit Court and the Florida Supreme Court as procedurally barred.

Another issue relating to the admissibility of statements given by Copeland is available for certiorari but is being consciously withheld (see petition, page 6) for abusive federal habeas corpus (piecemeal) litigation.

REASONS FOR GRANTING THE WRIT

This Honorable Court's recent decision in Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987) noted the existence of two questions which were to be answered at another time. First, this Court recognized that the question of the applicability of any "procedural bar" under Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982) remains unresolved. Second, the Court has noted that the issue of "harmless error" was not answered.

The resolution of these questions is necessary so that the scope of Hitchcock can be defined. While Mr. Copeland suggests that only "eight" inmates on Florida's death row are potentially affected, the State notes that "Hitchcock" claims are now being filed by every inmate sentenced prior to 1979, and even some sentenced after 1980.

This case is an excellent vehicle for addressing both claims. The "procedural bar" issue is patently ripe for review. Regardless of Copeland's claims of "confusion," Copeland himself was aware of the legal issue (as manifested by his pretrial pleadings) yet he did not raise it on direct appeal. Instead, Copeland rasied the claims in a (now de rigeur) eleventh hour collateral attack. The Florida Supreme Court rejected the claim as procedurally barred (not "waived"), thus preserving the issue for certiorari review.

Should the procedural bar invoked by the State not be deemed applicable, the record still supports a defense of "harmless error." Copeland asserted, pretrial, his right to present and argue "nonstatutory mitgating evidence." The State did not oppose him and the Court did not obstruct him. At sentencing, nonstatutory factors including "residual doubt

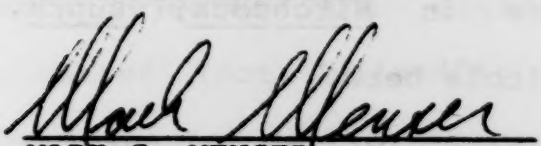
about guilt" were presented to the advisory jury and the sentencer. Copeland's attorney obviously did not feel "restricted" by the Court's decision to give the contested instruction, which was neither objected to nor appealed. No evidence exists to support the representation that either the judge or the jury felt they could not consider the evidence. Thus, the issue of harmless error reserved for future review in Hitchcock, supra, is indeed available here.

CONCLUSION

The case at bar offers the same rational and legal bases for granting certiorari as Hitchcock, while presenting two questions which Hitchcock could not answer, though noting that answers would be necessary. Thus, Florida agrees with Mr. Copeland that certiorari should be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ of Certiorari To The Supreme Court of Florida, Brief for Respondent in Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

RICHARD A. ROSEN
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of Americas
New York, New York 10019

All parties required to be served have been served on this _____ day of July, 1987.

_____
MARK C. MENSER
Assistant Attorney General